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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONTA IVORY, Defendant and Appellant.	A123557 (Alameda County Super. Ct. No. C154045)

A jury found defendant Donta Ivory guilty of first degree murder and unlawful firearm possession by a former juvenile ward. The court found the enhancement allegations to be true, and imposed a sentence of 75 years to life. Defendant seeks reversal, in whole or in part, of the judgment. As modified herein, we affirm the judgment.

BACKGROUND

In November 2006, the Alameda County District Attorney charged defendant with the murder of Malea Tufono in violation of Penal Code section 187, subdivision (a) (count 1),[1] and unlawful firearm possession in violation of section 12021, subdivision (e) (count 2). Certain firearm, prior conviction, and prior prison term enhancement allegations were also made. Defendant pled not guilty and denied the allegations. A jury trial on all but the prior conviction allegations was conducted in May 2008.

[1] All statutory references herein are to the Penal Code unless otherwise stated.

Relevant Evidence Presented at Trial

The trial evidence indicated that on December 14, 2005, police responding to a call reporting a shooting on the 1300 block of 97th Avenue in Oakland, found defendant fighting with a man over a revolver at the bottom of an apartment house's rear stairs, and a woman laying at the top of the stairs suffering from an apparent gunshot wound. The man, Jerome Williams, said defendant had just shot his girlfriend, Malea Tufono. She later died of a gunshot wound to her torso. Police confiscated the revolver, a shotgun on the grass by the stairs, and three sandwich bags of marijuana in Williams's pockets. On their way to the scene, they also saw a white Oldsmobile, possibly an Aurora, speeding from the area of the shooting.

A police department firearms examiner testified that the .357 caliber revolver had fired the bullet removed from Tufono's body. The expert also stated that the pistol required four pounds of trigger pressure to fire, and could be fired if someone held the trigger while someone else pulled on the revolver in a certain way.

Testimony of Jerome Williams

Jerome Williams testified that he was placed in a drug diversion program in April 2005 for narcotics possession; and although he knew he was not supposed to own or possess narcotics, he was selling marijuana in December 2005. He was later convicted of carrying a concealed weapon, and at the time of trial was serving a 90-day sentence for violating probation following a grand theft conviction.

Williams testified that the prosecution told him that he would not be prosecuted if he testified that in December 2005 he was in possession of, or selling, marijuana, and in possession of a shotgun, but had not promised to seek early release from his 90-day sentence. However, after defendant loudly exposed his testimony in the presence of other inmates, the prosecution agreed to seek his immediate release.

Williams said that in December 2005, he and Tufono were romantically involved and living in an apartment on 97th Avenue in Oakland. He kept a shotgun in a closet for protection because his neighborhood was "crazy." Sometime after 8:00 p.m. on

December 14, a man named Art called. Williams had sold him marijuana before, and agreed to meet him at a nearby restaurant to sell him more. Art drove a white Aurora.

Williams put some marijuana in sandwich bags, left his apartment, and went down the building's back stairs. He saw two shadows in the dark and started to turn around when defendant and another man came out of the shadows. He heard a man's voice say words to the effect of, "Empty your pockets. Take it in. Take it back upstairs." He was ordered, "Face down. Look at the ground." A gun was put to the back of his head, which was down, and a man escorted him up the stairs with a hand on his shoulder.

Halfway up the stairs, Williams heard Tufono say from the top of the stairs, "Let him go." A second man's voice said, "Shoot him. Shoot her. Shoot him. Shoot her." A gunshot was fired close behind him from the gun that had been placed to his head. He heard Tufono yell. He did not see a shotgun or hear one "being racked."

Williams turned around and began fighting with the man. The gun, the only one Williams saw that night, was still in the man's hand. They fell down. Williams bit the man in the eye and tried to hold him down, asking a neighbor to call the police. Williams wrapped his hand around a part of the gun, and the man shot once or twice, trying to shoot off his hand. The man asked his accomplice for help, but the second man ran away. While Williams held the man down, he answered a cell phone call from Art, who said he was in front of Williams's house; Williams asked for help, but Art never came.

The police arrived about 10 or 15 minutes after the fight started. Williams received treatment at a hospital for injuries to his hand and the back of his head. Williams did not tell police about his plan to sell marijuana to Art, and the police took the marijuana that Williams had with him.

Testimony of Robert Perazzo

Williams's neighbor, Robert Perazzo, testified that on the night of December 14, 2005, he heard "about two" shots fired on the stairs outside his apartment and a "young lady screaming something like, "Oh, my God. I've been hit." He went outside, where he saw a woman neighbor slumped over the stairs, bleeding, and a male neighbor scuffling with defendant over a gun.

Perazzo called the police and reported what was occurring. The audio recording of his call was played for the jury. As the two men fought over what Perazzo thought was a .357 caliber revolver, two more shots were fired and his neighbor was grazed. His neighbor said defendant had shot the woman and that, " '[t]hey ripped us off' of either the weed or the money." The fight lasted about five minutes.

Perazzo had received weapons training and owned a .357 caliber revolver. He thought the first two shots he heard were of the same velocity as shots fired from his revolver and did not hear a shotgun being fired.

Testimony of Sergeant James Rullamas

Oakland Police Department Sergeant James Rullamas testified that he interviewed defendant on December 15, 2005. In the first part, which was unrecorded, defendant said he went to 97th Avenue to buy marijuana, armed with a revolver, saw the seller beside a bag full of marijuana sacks, and decided to rob him. In a recorded interview later that day, which was played for the jury,[2] defendant told a more complete version of the same story.

Testimony of Officer Craig Chew

Oakland Police Department Inspector Craig Chew testified that he participated in another recorded interview of defendant on the evening of December 15, 2005. Defendant said he went to 97th Avenue to purchase marijuana from a man he had met two or three months before, saw him walking down the rear stairs of a residence with a large bag of what defendant believed was marijuana, and decided to rob him. Defendant withdrew a loaded .357 Magnum revolver from his waistband, intending to rob the man and take him back into his residence. As he started to escort the man, the man tried to grab the barrel of defendant's gun, but defendant struck him once and gained control of the situation. Defendant saw a woman at the top of the stairs with a shotgun pointed at

[2] The recording is not contained in the record, which contains the transcript that was given to the jury. The transcript does not appear to have been admitted into evidence, but the People do not object to its inclusion in the record.

him. When she loaded a round into the shotgun's chamber, defendant cocked his gun; he and the man holding him told the woman to put the shotgun down. The man grabbed defendant's gun and it fired as defendant fell. The two fought until police arrived.

Chew said defendant was "very calm, very oriented, [and] very coherent" during the interview. He did not appear to be under the influence of alcohol or drugs, and was "very articulate." He did not admit that there were any other people with him that night to help him commit the crime. An audiotape of this interview was also played for the jury.[3]

Defendant's Testimony

Defendant testified he was convicted of possession of a controlled substance for sale in 2000, and had admitted to second degree robbery as a juvenile in 1994. He and two friends, Huey Maxwell and Ira Hayes, sold marijuana.

On the night of the shooting, defendant gave Maxwell $700 to buy two ounces of marijuana and the two drove to Williams's residence, each armed with a firearm. Defendant did not think Hayes was a part of their plans and did not see his white Aurora, but later learned Hayes and Maxwell had planned to rob Williams without his knowledge.

Defendant followed Maxwell to the rear of the residence, where they met Williams, who had a large plastic grocery bag containing packages of marijuana. When Williams said he wanted $350 an ounce, Maxwell, to defendant's surprise, drew what looked like a nine-millimeter automatic, pointed it at Williams, and said, "Nigga, I'm keeping this."

A few seconds later, a woman appeared at the top of the stairs with a shotgun that she pointed at defendant. He drew his weapon to protect himself and Maxwell, and grabbed Williams, using him as a shield. He and Williams told the woman to drop the shotgun, but she "racked a round" instead. Defendant held his gun over Williams's

[3] This recording is also not in the record, which includes a transcript of it that was given to the jury. Although the transcript does not appear to have been admitted into evidence, the People do not object to its inclusion in the record.

shoulder and cocked it as he backed down the stairs. Williams grabbed it and the gun fired. Defendant did not pull the trigger and did not take deliberate aim at the woman. He did not hear the shotgun being fired; although the defense suggested that evidence indicated that the shotgun had been fired, it is not an issue in this appeal.

After a brief pause, Williams grabbed defendant and they tumbled down the stairs. Williams tried to take the gun from defendant, so defendant fired twice to scare him into letting go, but Williams did not. Defendant assumed Maxwell took off after the first shots were fired. The police arrived about eight or ten minutes after the fight began.

Defendant did not tell the authorities in his interviews who else was with him because he did not want to "snitch" on his friends. He thought he would still be in danger if he went to prison and he was worried about his grandmother, who still lived in the neighborhood. He decided to testify about Maxwell and Hayes because he "would be a fool" to spend the rest of his life in prison.

On cross-examination, defendant testified further about his 1994 juvenile robbery. He also said that he did not know the felony-murder rule applied to accidental killings until the judge explained the law during voir dire.

Verdict and Sentence

The jury found defendant guilty of both counts, the murder to be in the first degree, and all the firearm enhancements prosecuted to be true. Defendant waived his right to a jury trial on the two prior conviction allegations, which the court found to be true.

The court sentenced defendant to a prison term of 75 years to life. This included 50 years to life for the first degree murder, based on a sentence of 25 years to life that was doubled under a "two strikes" enhancement allegation, and a consecutive term of 25 years to life for discharge of a firearm causing death. The court also imposed a concurrent term of six years under the second count, also doubled under the "two strikes" allegation, and dismissed the prior prison term allegation.

Defendant subsequently filed a timely notice of appeal.

DISCUSSION

I. *Impeachment Testimony Regarding the Juvenile Robbery*

Defendant first argues that the trial court committed prejudicial error by failing to sufficiently "sanitize" or exclude evidence of his 1994 commission of a juvenile robbery, thereby violating his state and federal due process rights. He argues in the alternative that, if his trial counsel did not sufficiently object, he received ineffective assistance of counsel. We conclude his arguments lack merit.

A. *The Proceedings Below*

It was alleged in count 2 of the information that defendant had violated section 12021, subdivision (e), which bars a person under 30 from possessing a firearm if he or she previously committed a juvenile offense listed in Welfare and Institutions Code section 707, subdivision (b), including robbery. It was also alleged that defendant had been adjudged a juvenile ward for violating section 211, the robbery statute. The information also contained two prior conviction enhancement allegations, including one for juvenile robbery.

Before trial, the court granted defendant's motion to bifurcate trial of the prior conviction enhancements, to which the people did not object, and ruled that any prior convictions were not admissible for substantive purposes. However, in order to prove the section 12021, subdivision (e) violation alleged in count 2, the People sought to establish that defendant had committed a juvenile robbery. Defendant's trial counsel said that, while he had not yet talked with defendant, he thought the defense would request "that the matter be held in abeyance so that he would enter a plea of guilty to that contingent upon a finding of the murder count." The court responded that "there's no such thing. I can't take that provisional guilty plea," and that defendant's choices were to have the entire count read to the jury or to stipulate to the elements of the charge. The court said a stipulation on the same charge had been entered into in another case recently, and the prosecution indicated it was amenable to one. The court noted, however, that the stipulation "became somewhat moot" because the defendant had testified, and was

impeached with the prior juvenile act. At defense counsel's request, the court deferred the matter until counsel had the opportunity to confer with defendant.

Subsequently, the court considered the prosecution's request that it be allowed to impeach defendant with his prior criminal conduct, including his 1994 juvenile robbery, should he testify. The court noted a problem with the juvenile robbery finding because "absent a stipulation or an agreement of the parties, the fact of the finding is not admissible to impeach, unlike the fact of a felony conviction. [¶] So if the court felt that the conduct was relevant under the entire analysis to be admissible for the purposes of impeachment, then counsel, one or the other or both, would have to inquire about the conduct itself that occurred and would be limited essentially in doing so to the essential elements of the conduct that make that conduct involving moral turpitude." The court held in abeyance any ruling until the prosecution provided discovery of its juvenile robbery records.

Later in the trial, the prosecution read a stipulation in open court, before the jury, which stated "[t]hat on December 14, 2005, [defendant] was under 30 years of age, and Number 2, that before December 14th, 2005, the defendant had been found in violation of an offense listed in Welfare and Institutions Code Section 707 subdivision (b), and had been adjudged a ward of the juvenile court."

Defendant subsequently testified on direct examination that he had a 2000 drug conviction and had admitted in 1994 to the commission of a juvenile robbery. Before cross-examination, the court, without defense objection, ruled that the prosecutor could ask about defendant's commission of the robbery because it was relevant to his credibility, but not about his use of a firearm during the robbery. On cross-examination, defendant testified that he walked into a bait shop, ordered the clerk to open the register, ordered the clerk down on the ground, and took the money from the register. He ordered the clerk to put the best fishing reels in a bag, ordered the clerk to lie on the floor, and left the building. The defense did not object to the line of questioning that elicited any of this testimony.

Later in the cross-examination, the prosecutor, in questioning defendant about his role in Tufono's shooting, asked if people who commit robbery usually use weapons to force people to do things, and defendant agreed that this was the case. Again, the defense made no objection.

With regard to the second count, the jury was instructed, pursuant to the parties' stipulation, that the juvenile violation supporting the firearm charge was "a section 707(b) offense" without expressly referring to it as a robbery.

In closing argument, the prosecutor used defendant's testimony about the juvenile robbery to challenge defendant's credibility. The court instructed the jury that it could consider the prior criminal acts evidence in its evaluation of his credibility, but not regarding his liability for the charged crimes. The court did not further instruct the jury about this evidence.

B. ***Analysis***

1. ***Forfeiture***

The People argue that defendant has forfeited his claim by not objecting at trial. Defendant argues the trial court's ruling that testimony about the robbery was permissible for impeachment purposes preserved his appellate claim, and that any further objection would have been futile in light of the court's pre-trial comment that sanitization of this testimony was "somewhat moot" if defendant testified.

We agree with the People. "In the absence of a timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed." (*People v. Clark* (1992) 3 Cal.4th 41, 125-126.) Defendant did not attempt to limit the scope of cross-examination, or object to any of the prosecution's cross-examination questions. Defendant did not propose further jury instructions. Defendant has forfeited his appellate claim as a result.

Defendant argues that any due process objection would have been futile in light of the court's pre-trial comment that sanitization had become "somewhat moot" in a prior case when the defendant testified. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-822 [discussing circumstances under which further objection would have been futile].) We

reject the argument. The court's comment was not part of a ruling; indeed, there was no motion or objection pending before it. Rather, the court was talking about a previous case, qualified its "moot" reference with the word "somewhat," gave defendant's counsel further time to confer with his client about what he wanted to propose regarding the second count, and did nothing to preclude any further proposals, motions, objections, or argument. Defendant does not establish futility under these circumstances.

Defendant further argues that the court's ruling that the prosecution could inquire further about the juvenile robbery in cross-examination somehow preserved his appellate claim. Defendant did not object to the scope of the prosecution's cross-examination and, therefore, did not preserve any appellate claim regarding it.

2. *No Error*

Assuming for argument's sake that defendant did not forfeit his appellate claim, the trial court did not commit error by admitting the evidence of his juvenile robbery conduct for impeachment purposes.

Article I, section 28, subdivision (f)(4), of the California Constitution states that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." Pursuant to this constitutional provision, our Supreme Court has held that a prior conviction that involves moral turpitude "is prima facie admissible, subject to the exercise of trial court discretion." (*People v. Castro* (1985) 38 Cal.3d 301, 316.)

As the trial court correctly indicated, an order adjudging a minor to be a juvenile ward is not admissible for impeachment purposes because it cannot be deemed a conviction of a crime. (*People v. Sanchez* (1985) 170 Cal.App.3d 216, 218-219.) Nonetheless, a trial court may admit prior juvenile *conduct* evincing moral turpitude, subject to the usual evidentiary limitations. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1740.)

In exercising its discretion, a court weighs the probative value and prejudicial effect of the proffered impeachment evidence pursuant to Evidence Code section 352.

(See *People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; Evid. Code, § 352.) In exercising its discretion, the court should consider four factors, although they "need not be rigidly followed": "(1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) " 'A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.' " (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

Defendant makes numerous arguments for why the juvenile robbery conduct should have been further sanitized or excluded. He argues robbery "is a crime of force or fear in which no direct duplicity or deceit is involved" and "not particularly probative of veracity to begin with." He argues the court's limiting of the questioning to the essentials of the robbery was insufficient, particularly because his use of a firearm in the robbery was apparent from the details of his testimony. He further argues that the robbery was too remote in time to be relevant to his veracity, and that the evidence was particularly prejudicial because the robbery was "*identical* to the sole prosecution theory of first degree murder here, which jurors apparently accepted." Finally, he criticizes the trial court for its purported lack of analysis pursuant to Evidence Code section 352.

Defendant's arguments do not establish abuse of discretion for several reasons. First, defendant gives little, if any, credence to the fact that his juvenile robbery conduct involved moral turpitude. (See *People v. Jackson* (1985) 174 Cal.App.3d 260, 266 ["there can be little doubt robbery also involves elements that are pertinent to witnesses' veracity and honesty"].) As such, it was prima facie admissible to impeach his credibility. (*People v. Castro*, *supra*, 38 Cal.3d at p. 316.)

Second, the court's limitation on the scope of the cross-examination, by allowing questions about the "element of robbery" and barring questions about firearm use, indicates it balanced the relevance of the impeachment evidence with its potentially prejudicial nature consistent with Evidence Code section 352. While the prosecutor asked about defendant "ordering" a store clerk to take various actions, these questions were targeted to defendant's robbery conduct.

Third, the impeachment inquiry suggested the use of coercive force, but it was not necessarily "apparent" that it involved the use of a firearm specifically. Similarly, although defendant notes that the jury was told via the stipulation that the juvenile violation supporting the firearm charge was an offense under Welfare and Institutions Code section 707, subdivision (b), this did not establish use of a firearm either. Defendant also points out that the prosecution later "got" defendant to admit that people who commit robbery usually use weapons to force people to do things, but this occurred in the course of questions about the charged offense, and came after the court's ruling about the impeachment evidence. It is not relevant to the court's ruling.

Fourth, defendant's conduct in the juvenile robbery had similarities to his alleged conduct in the charged murder, but it was not identical. As described, it involved a store robbery, had nothing to do with drugs, and did not involve violence. In any event, numerous appellate courts have found that impeachment with a prior conviction very similar or identical to the charged offense is permissible. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138, 1139; *People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590 [robbery priors identical to charged offense]; *People v. Dillingham* (1986) 186 Cal.App.3d 688, 695-696 [allowing impeachment with three virtually identical prior convictions]; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65-66 [robbery defendant impeached with prior robbery convictions].)

Fifth, as the People point out, the robbery, although it occurred approximately 14 years before trial, was not necessarily so remote in time as to be inadmissible. Such evidence is admissible when a defendant has not led "a legally blameless life" since the time of the conviction. (*People v. Mendoza, supra*, 78 Cal.App.4th at pp. 925-926

[finding a 16-year-old conviction was not automatically inadmissible].) Defendant had not done so, as he acknowledged in his testimony that he was convicted of a crime in 2000, and had sold marijuana in recent years.

In short, defendant put his credibility at issue by testifying that he had not intended to rob Williams and that, although his gun may have fired the shot that killed Tufono, he did not intend to shoot her. His testimony contradicted Williams's and Perazzo's testimony, as well as his own confessions to police. The court appropriately limited the prosecution's inquiry to his juvenile robbery conduct that involved moral turpitude. Under the circumstances, defendant does not establish that the court abused its discretion.

3. *Any Error Was Harmless*

Any purported error by the court in allowing impeachment with the juvenile robbery conduct was also harmless, whether evaluated under the state or federal standard for prejudicial error. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)[4]

The evidence of defendant's guilt under the felony-murder rule was very strong. Defendant confessed in two interviews the day after the shooting that he intended to rob Williams, even as he claimed to have acted alone. While he testified at trial that he lied in these interviews to protect his friends, *he did not explain why he admitted to intending to rob Williams*. We can think of no reason why defendant would do so unless it was true; that he did not change his story until after he learned of the dire consequences of the felony-murder rule further indicates that his lie was at trial.

Defendant's testimony also contained very damaging concessions. He conceded, as he had to in light of the evidence, that he was armed and standing very close to Williams when Tufono appeared; prepared to fire his revolver at her; and deliberately fired additional shots as he wrestled with Williams. He also acknowledged that he and

[4] The parties disagree throughout their briefing about whether the state or federal standard applies to the particular errors claimed. Given our view that there was overwhelming evidence of defendant's guilt, we need not resolve their differences.

Maxwell were friends with Ira Hayes, whom, the evidence suggested, as "Art," coaxed Williams to leave his apartment with marijuana. Despite defendant's gloss about his intentions, these concessions further indicated he actively participated in attempting to rob Williams, and undermined his contention that his gun merely went off accidentally in Tufono's general direction.

In light of his confessions and testimony, defendant's efforts to exculpate himself at trial were unpersuasive. His contentions—such as that, although he accompanied Maxwell armed with a loaded .357 caliber revolver, he did not know Maxwell intended to rob Williams; that despite his surprise with Maxwell's actions, he immediately grabbed Williams and prepared to fire his revolver at Tufono when she appeared; that he just happened to shoot Tufono in the stomach through no fault of his own; and that he only fired additional shots to scare Williams as he wrestled with him—were incredible.

Williams's and Perazzo's testimony also was very damaging. Their testimony was consistent with each other, and with other evidence. Perazzo testified, for example, that Williams told him as he wrestled with defendant that defendant had shot Tufono and robbed him. This was a powerful indicator that Williams testified truthfully, since Williams was unlikely to have concocted a lie in the few moments between the shooting and Perazzo's appearance on the scene.

In short, defendant asked the jury to believe that his actions were the result of a remarkable confluence of coincidence, betrayal, surprise, self-preservation, and bad luck. The evidence does not support his contention. One thread of logic neatly ties it together: defendant deliberately sought to rob Williams and shoot Tufono.

Furthermore, whether the gun fired accidentally or not did not matter in establishing defendant's criminal liability under the felony-murder rule, as the jury was instructed. (See, e.g., CALCRIM No. 540A ["A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent"].) The evidence was overwhelming that Tufono was killed as a result of actions defendant committed in the course of robbing Williams. His multiple confessions that he intended to rob Williams, his actions at the scene, which were consistent with such an intent, and his

acknowledgment that he pointed his gun at Tufono and prepared to fire it just before she was shot, convincingly established his guilt.

Defendant argues this was a "live credibility" case in which "this whole case turned on [defendant's] credibility," making admission of his juvenile robbery conduct particularly prejudicial because it undermined the jury's ability to fairly evaluate his testimony. He contends the court's limiting instruction was inconsequential, and that the jury's request for certain readbacks of testimony indicates this was a particularly close case. We disagree. Regardless of the impeachment evidence, the jury had very strong reasons to disbelieve defendant's trial testimony, including his own confessions to robbery. There was overwhelming evidence of his guilt. Even if the trial court had erred in admitting the prior robbery conduct, the error was harmless beyond a reasonable doubt.

Given our conclusions that the court did not err and that any purported error was harmless, we do not need to discuss defendant's ineffective assistance of counsel argument.

II. *Bifurcation and Severance*

Defendant next argues that the court should have severed or bifurcated the trial of count 2. We agree with the People that defendant forfeited these claims, that the court did not err, and that any error was not prejudicial.

A. *Forfeiture*

The People argue that defendant forfeited his appellate arguments because he did not move for severance or bifurcation below. Defendant contends that his counsel's request to hold count 2 "in 'abeyance' was ample to signal both requests." We agree with the People.

Pursuant to section 954, a trial court, "in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . ." (§ 954.) Section 954 does not impose a sua sponte duty on the trial court to order the severance of counts, and a "defendant's failure to request a severance waives the matter on appeal." (*People v. Hawkins* (1995) 10

Cal.4th 920, 940, disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) Likewise, our own research indicates that the trial court has no sua sponte duty to bifurcate proceedings. (See *People v. Barre* (1992) 11 Cal.App.4th 961, 965 [trial court properly submitted prior-conviction allegation to jury where defendant did not request it be bifurcated].)

Defendant's trial counsel's indication to the court that defendant *might* propose holding count 2 in "abeyance" subject to a determination on count 1, was not a motion. The court properly understood it to be a suggestion that defendant might propose to enter an inappropriate provisional plea. Subsequently, defendant entered into a stipulation regarding elements of the count, rather than move to sever or bifurcate. Defendant plainly forfeited his severance and bifurcation claims by not raising them below.

Defendant also argues that, irrespective of the timing or sufficiency of his trial counsel's objection below, reversal is required because a single trial of both counts resulted in "gross unfairness" that denied him due process and a fair trial. We do not agree. Defendant did not establish that the trial of both counts resulted in gross unfairness, particularly in light of the admissible impeachment evidence and the stipulation. Defendant provides a lengthy list of citations to cases that do not involve such circumstances. We also reject his suggestion that we exercise our discretion to review the matter.

B. *Severance*

Even if defendant had not forfeited his severance claim, it lacks merit. As the People point out, severance of charges may be constitutionally required if joinder "would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.) However, [t]he law prefers consolidation of charges." (*People v. Ochoa* (2001) 26 Cal.4th 398, 423.) When the requirements for joinder under section 954 are met, "a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.) In determining whether there was an abuse of discretion, a court considers "(1) the cross-admissibility of the evidence

in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case." (*Id*. at p. 161.) Complete cross-admissibility, although not necessary to justify joinder (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284), is sufficient by itself to deny severance. (*People. v. Bradford* (1997) 15 Cal.4th 1229, 1316.)

Here, the evidence related to count 1 and count 2 were plainly cross-admissible. The fact that defendant used a firearm was admissible in separate trials. As for the evidence of his prior commission of a juvenile robbery, we have already discussed that the trial court did not err in permitting the People's limited inquiry into his conduct during that robbery for impeachment purposes. Therefore, defendant has failed to show the trial court abused its discretion.

In any event, as we have already discussed, the evidence of defendant's guilt was overwhelming. Therefore, even if the trial court had committed error, it would not have resulted in reversible prejudice under either the state of federal standard. (*Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.)

C. *Bifurcation*

Defendant also argues that, although he cannot find authority on the issue, "there is no reason why courts cannot bifurcate substantive firearm charges . . . , not just prior conviction enhancements or gang enhancements." Trial courts should have "broad authority to bifurcate (not just sever) charges under Penal Code section 1044; therefore, the trial court should have bifurcated count 2 because "[i]t shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.)

Defendant's argument lacks merit, even assuming arguendo that it were possible to bifurcate as he proposes. As we have already discussed, the facts underlying count 2

were admissible with regard to count 1, at the very least for impeachment purposes. Defendant does not explain why the court erred by rejecting his purported motion to bifurcate count 2 under these circumstances. He argues prosecutors should not be able to "shore up truly weak cases deserving of bifurcation just by alleging substantive gun or gang charges too," and that evidence of defendant's juvenile robbery conduct was highly prejudicial, and of minimal probative value. His argument is premised, however, on his incorrect view that the prosecution was not entitled to impeach him with evidence of his juvenile robbery conduct. The court did not err in rejecting any purported defense motion to bifurcate.

Also, as we have discussed, the evidence of defendant's guilt was overwhelming. Any error regarding bifurcation or severance undoubtedly was harmless under either the state or federal standard. (*Chapman, supra*, 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836.)

We also reject defendant's contention that he received ineffective assistance of counsel because any severance or bifurcation request would have been meritless, as we have discussed.

III. *Purported Juror Misconduct*

Defendant argues that the trial court erred by not conducting an inquiry into his unsubstantiated assertion at trial that three of the jurors appeared to be sleeping at various times. This argument also lacks merit.

A trial court must conduct a sufficient inquiry to determine allegations of jury misconduct "whenever the court is put on notice that good cause to discharge a juror may exist." (*People v. Burgener* (1986) 41 Cal.3d 505, 519, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) "The decision whether to investigate the possibility of juror bias, incompetence or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court." (*People v. Ray* (1996) 13 Cal.4th 313, 343.)

However, "not every incident involving a juror's conduct requires or warrants further investigation." (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A court is only

required to make whatever inquiry is necessary to resolve questions of juror misconduct "when the defense comes forward with evidence that demonstrates a 'strong possibility' of prejudicial misconduct." (*People v. Hayes* (1992) 21 Cal.4th 1211, 1255.)

In the middle of the prosecution's case, defense counsel stated, "Ivory indicated to me—and I try to observe, but I wasn't completely cognizant of what he was saying—that jurors 5, 7 and 9 at various times appeared to be sleeping. I don't know whether they were or not, but he is very concerned about that." The court responded, "Okay. I didn't notice any jurors sleeping. Thanks." No further inquiry, and no request for a further inquiry, was made.

Defendant did not present evidence indicating a "strong possibility" of prejudicial jury misconduct. He merely had his counsel express defendant's "concern" that three jurors "appeared to be sleeping" at unspecified "various times," a concern that was not shared by his own counsel. Defendant does not establish that the court abused its discretion by taking no further action regarding this vague, qualified, and unsubstantiated claim. We find no abuse of discretion or other violation of defendant's rights. As a result, we need not address the remainder of the parties' arguments on this issue.

IV. *Aiding and Abetting Instruction*

Defendant next argues that he was denied due process of law, a fair trial, and a jury determination of all issues because the court erred by failing to properly instruct the jury regarding aiding and abetting. We conclude that, assuming arguendo the trial court erred, it was undoubtedly harmless.

Defendant does not contest that the trial court properly instructed the jury regarding felony murder by actual killers. The court also instructed the jury that a person could be guilty of robbery, or attempted robbery, as an aider and abettor, as follows:

"To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety. [¶] . . . [¶] However, as stated in Instruction 540A, for purposes of the felony-murder rule, the defendant must have intended to commit the felony of robbery or attempted robbery before or at the time of

the act causing death. That is, if a defendant is guilty of robbery or attempted robbery as the actual perpetrator, he would be guilty of felony murder for any death caused in the course of that robbery or attempted robbery, keeping in mind that the robbery or attempted robbery continues until the perpetrator has reached a place of temporary safety as defined above. However, if a defendant is guilty of robbery or attempted robbery as an aider and abettor, he would be guilty of felony murder only if the death occurred at the time of or after defendant became an aider and abettor, including having the intent to commit the felony. If defendant's status as an aider and abettor is achieved after the death has occurred, he would be guilty of the felony but not of felony murder."

Despite this instruction, the court did not provide the jury with a specific definition of aiding and abetting, such as that contained in CALCRIM No. 401.

As the People point out, even significant instructional errors are generally subject to harmless error analysis. (*People v. Floyd* (1998) 18 Cal.4th 470, 499 ["instructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to *Chapman* review on direct appeal"].) Assuming for the sake of argument that the trial court erred by not providing this definition of aiding and abetting, the error was undoubtedly harmless under *Chapman*, *supra*, 386 U.S. at page 24, which defendant asserts is the standard to apply.

Defendant argues that if the court had instructed the jury pursuant to CALCRIM No. 401, the jury could have acquitted him of murder because it would have learned that defendant was required to have known of the perpetrator's unlawful purpose and to take some action in support of the perpetrator's commission of the crime. Defendant apparently contends the jury could have believed his testimony that he did not intend to aid Maxwell in a robbery, even if he cocked his revolver at Tufono in part to protect Maxwell, who was robbing Williams at the time. His argument is, to say the least, very unpersuasive.

Defendant also contends his counsel's closing argument that the robbery was completed when Maxwell fled the scene somehow could have led to his acquittal with the proper instruction. However, Williams indicated in his testimony that defendant's

accomplice was present for a time as Williams fought with defendant after the shooting, and defendant testified that he assumed Maxwell fled *after* the first shots were fired. In other words, there is no evidence that Maxwell fled the scene before Tufono was shot.

Defendant further insists that the prosecution argued the alternative theory that defendant was guilty because he, at the very least, aided and abetted the robbery. This is incorrect. In his closing argument, the prosecutor quickly referred to the possibility that defendant was aiding and abetting Maxwell when he pulled out his revolver. However, this reference was part of a larger argument that defendant was "in the process of the robbery at the point when Tufono comes out and points that shotgun."

Finally, the evidence of defendant's guilt as Tufono's murderer was overwhelming. Accordingly, we conclude any error was undoubtedly harmless, whether evaluated under either the federal or state standard. (*Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.)

In light of our conclusion, we do not address the remainder of the parties' arguments, such as the People's contention that defendant forfeited his claim by failing to raise it to the trial court below.

V. *The Court's Instruction Regarding Defendant's Prior Felony Conviction*

Defendant next argues that the trial court erred because it did not sua sponte instruct the jury that a prior felony conviction admitted to impeach him could not be used to infer his predisposition to commit crimes. He contends the omission of such an instruction violated his due process rights and denied him a fair trial. This argument also lacks merit.

The trial court has a sua sponte duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884.) However, it generally does not have such a duty regarding "the limited admissibility of evidence of past criminal conduct." (*People v. Collie* (1981) 30 Cal.3d 43, 64.) "When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury

accordingly." (Evid. Code, § 355, italics added, *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.)

The trial court instructed the jury to limit its consideration of the prior crimes evidence pursuant to CALCRIM No. 316, which instructs that convictions admitted for impeachment purposes may be considered "only in evaluating the credibility of the witness's testimony." Nonetheless, defendant argues that the trial court should have, sua sponte, instructed the jury with "the more specific anti-criminal propensity language in CALJIC No. 2.50," and that "CALCRIM's continuing omission of any limiting instruction for prior convictions used to impeach criminal defendants . . . is simply anomalous and should be corrected."

Both parties acknowledge that there may be an occasional extraordinary case in which the court is required to give, sua sponte, a limiting instruction about a defendant's prior crime. CALCRIM No. 375, which is equivalent to CALJIC No. 2.50, recognizes such an obligation in such extraordinary cases, " 'in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.' " (CALCRIM No. 375, Bench Notes, quoting *People v. Collie*, *supra*, 30 Cal.3d at pp. 63-64.)

Defendant argues that this was, "at a minimum," such an extraordinary case. We disagree. The evidence of defendant's prior crimes, while relevant to his credibility. was not "a dominant part of the evidence against" him, and the limiting instruction the court provided made clear that the jury was to consider the prior crimes evidence solely for impeachment purposes. The court had no sua sponte obligation to further instruct the jury. The evidence against defendant was overwhelming. Any error was undoubtedly harmless, whether evaluated under either the federal or state standard. (*Chapman, supra*, 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836.)

VI. *Proof Instructions*

Defendant next argues that the court's jury instruction on reasonable doubt, based on CALCRIM No. 220, as well as other instructions that stress the jury was to decide issues based on the facts and evidence at trial, were erroneous and violated his rights to

due process, a fair trial, and a jury determination of all issues based on the proper "beyond a reasonable doubt" standard. We disagree.

Defendant argues the court erred by instructing the jury, pursuant to CALCRIM No. 220, that "[p]roof beyond a reasonable doubt is proof that leaves you with an *abiding conviction* that the charge is true." (Italics added.) According to defendant, this "abiding conviction" language constitutes reversible per se structural error. Defendant acknowledges that our Supreme Court has rejected his "abiding conviction" argument based on *People v. Freeman* (1994) 8 Cal.4th 450, 502-504, and makes his argument in order to exhaust his state remedies. As the People point out, defendant's arguments about CALCRIM No. 220 have also been rejected by a number of California courts. (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 28-32; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1238-1239.) We reject defendant's argument based on this case law as well.

Defendant also argues that the court erred by instructing the jury, pursuant to CALCRIM Nos. 200 and 222, that it "must decide what the facts are," and, pursuant to CALCRIM Nos. 223 and 3550, that it was to decide issues based on the evidence presented at trial. He further complains about the definition of "evidence" as, in effect, testimony, exhibits, and stipulations, as stated in CALCRIM No. 222. According to defendant, these instructions do not take into account that jurors may decide what happened based on the *absence* of evidence; read together with CALCRIM No. 220, "it was patent error to tell jurors reasonable doubt must arise from evidence presented at trial, as undoubtedly occurred here in this spate of several like instructions."

Defendant's argument is not supported by the instructions given in the present case. While defendant acknowledges that similar claims were rejected in cases such as *People v. Guerrero* (2007) 155 Cal.App.4th 1264, he does not explain why: as held in *Guerrero*, CALCRIM No. 220 makes clear that the defendant is presumed innocent, and that the People must prove their case. As the trial court instructed the jury in the present case, "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (See also *People v.*

Westbrooks (2007) 151 Cal.App.4th 1500, 1509-1510 [rejecting a similar argument].) Defendant's argument lacks merit.

VII. *Imposition of a Strike Based on Defendant's Juvenile Violation*

Defendant asserts, again in order to exhaust his state remedies, that the imposition of his 1994 juvenile violation as a strike was unconstitutional because he did not have a right to a jury trial and, he claims, did not waive jury trial in the course of his admission. He acknowledges that our Supreme Court has reached the contrary decision in *People v. Nguyen* (2009) 46 Cal.4th 1007. Here, as in *Nguyen*, defendant waived jury trial on the prior conviction allegations, the court found the prior juvenile offense allegation true based on the juvenile proceeding, and sentenced him accordingly. We follow *Nguyen*, and reject defendant's claim accordingly. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant also presents a vague and confused argument that his claim is cognizable and, in the alternative, that he received ineffective assistance of counsel. We need not address these arguments in light of our reliance on *People v. Nguyen*, *supra*, 46 Cal.4th 1007.

VIII. *The Concurrent Second Strike Term for Count 2*

Defendant also argues that the trial court's doubling of the concurrent term for count 2 pursuant to sections 1170.12, subdivision (c)(1), and 667, subdivision (e)(1), based on the information's "two strikes" enhancement allegation, was unauthorized because that allegation applied to count 1 only. The People argue this pleading limitation was inconsequential in light of *People v. Morales* (2003) 106 Cal.App.4th 445 (*Morales*). We agree with the People.

A. *The Proceedings Below*

The information alleged as a prior conviction defendant's juvenile adjudication for second degree robbery. This allegation was *not* limited to count 1. However, the information's "two strikes" allegation stated, "It is further alleged *as to count 1* that the above prior conviction is within the purview of" the relevant statutes. (Italics added.)

The prosecution presented evidence in support of the prior conviction allegations, including about the juvenile robbery, and the defense offered no evidence or argument regarding them. The court found "that the allegations of the prior convictions as represented in the information are true," finding specifically that defendant was convicted in 2000 of possession for sale of a controlled substance in violation of Health and Safety Code section 1351, and that he was previously found to have committed second degree robbery as a juvenile and adjudged a ward of the court. The court rejected the defense motion to strike the juvenile adjudication pursuant to section 1385.

After counsel indicated that there was no legal cause why sentence should not be pronounced, members of the victim's family spoke, as did defendant. The defense then indicated it had nothing further, and the court pronounced sentence. The court then stated that it was doubling both the first and second count terms "in light of the prior strike finding, that is the second alleged conviction, which is in truth a juvenile adjudication[.]" It imposed a concurrent doubled second strike term for count 2 of six years.

B. ***Analysis***

Defendant does not contest that his sentence for count 2 can be doubled pursuant to sections 667, subdivision (e)(1), and 1170.12, subdivision (c)(1), the statutes cited in the information's "two strikes" enhancement allegation.[5] Instead, defendant argues that the trial court erred when it doubled his sentence for count 2 because the enhancement allegation stated that it applied to count 1, and the prosecution did not request an amendment or three strikes finding regarding count 2.

Defendant's argument is unpersuasive. He asserts that a doubled term was "waived under state law and, further, imposition of such a term at the last minute without pleading, findings, or even a request therefor constituted a patent deprivation of notice both under state law and the federal Constitution." However, rather than provide a

[5] Sections 667, subdivision (e)(1), and 1170.12, subdivision (c)(1), each states: "If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."

reasoned legal analysis to support his arguments, he cites a string of cases and constitutional provisions with very little, if any, explanation of their significance.

The People, on the other hand, cite and discuss *Morales*, *supra*, 106 Cal.App.4th 445. There, the trial court found that enhanced sentencing allegations made pursuant to sections 667, subdivisions (b) through (i), and 1170.12 referred to only one of three counts contained in the information and, therefore, that the terms for the unreferenced counts could not be doubled. (*Morales,* at p. 455.) The appellate court disagreed, "based in large part upon the exact language in sections 667, subdivisions (b) through (i) and 1170.12." (*Ibid*.) The court noted that "[s]ection 667, subdivision (f)(1) states: 'Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d),' " and that the same statutory requirements appear in section 1170.12. (*Morales,* at p. 455.) The court concluded that "[f]airly construed, sections 667 and 1170.12 require enhanced sentencing once a prior violent felony conviction has been pled and found to be true, unless the court dismisses the prior conviction finding pursuant to section 1385, subdivision (a)." (*Id*. at p. 456.) It noted that the factual findings regarding the prior convictions made no reference to a particular count in the information and that there were no arguments by counsel (*ibid*.), and stated that "[a]ny error in the jury or trial court findings have been waived by the failure to object to them." (*Ibid*.) It held that that the trial court should designate principal and subordinate terms "and then double *each* of them." (*Ibid*.)

Similarly, here, the information's prior conviction allegation and the court 's finding that defendant was adjudged as a juvenile to have committed second degree robbery were not limited to any particular count, and counsel presented no argument below. Therefore, we conclude *Morales* controls.

Defendant challenges application of *Morales*, *supra*, 106 Cal.App.4th 445, on two grounds. First, he contends that, because the prosecutor in *Morales* asked for imposition of "second strike" terms on all the counts, while the prosecution in the present case did not, "[t]his distinguishes *Morales* from [defendant's] authorities . . . finding waiver under

state law or deprivation of notice under the federal Constitution." Second, defendant, relying on two cases that he cites but does not discuss, asserts that, "contrary to any suggestion in *Morales*, the mandatory pleading language of the Three Strikes law . . . is at best ambiguous as to whether it requires the prosecutor to plead 'strikes' as to *each count* versus the selective case pleading evident here."

Defendant's two arguments are unpersuasive. In *Morales*, *supra*, 106 Cal.App.4th 445, the appellate court's reasoning and conclusion did not rest on the prosecutor's request for the enhancement's application to all the charges. Indeed, the prosecutor's request came *after* the jury and the court made their factual findings. (*Id*. at p. 452.) Instead, the appellate court relied on statutory language indicating that the relevant sentencing enhancement " '*shall be applied in every case* in which a defendant has a prior felony conviction . . .' " (*id*. at p. 455, italics added), and on the defense failure to raise any issues about the unlimited scope of the factual findings. These reasons apply equally to the present case. Defendant also fails to explain at all why the statutory language is purportedly ambiguous, contrary to the court's view in *Morales*.

Defendant also does not meaningfully discuss the significance of any of the case law he cites. Defendant must "affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.) We are not required to consider alleged errors when "the relevance of the cited authority is not discussed." (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) In the absence of a meaningful legal analysis by defendant, and given his unpersuasive effort to distinguish *Morales*, we find the trial court did not err in doubling defendant's count 2 sentence.

Defendant makes a one-sentence argument that, "if defense counsel were somehow required to object" below and did not, defendant received ineffective assistance of counsel. In order to establish a claim of ineffective assistance of counsel on a direct appeal, a "defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary,

we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) Defendant establishes none of these matters in his briefing and, therefore, we reject his ineffective assistance of counsel argument as well.

IX. *The Amount of the Probation Investigation Reimbursement*

Finally, defendant argues that the trial court erred when it ordered him to reimburse costs of the probation investigation beyond the actual costs of that investigation. The People concede the issue. We agree that the court erred.

A court may order a defendant who has the financial ability to pay, among other things, for the costs associated with the production of a presentence probation report. (§ 1203.1b, subd. (a).) The presentence probation report calculated a probation investigation fee of $62.50, but the court ordered defendant to pay $100. The court's order was improper, and should be modified to reflect the actual cost of $62.50. (See *People v. Poindexter* (1989) 210 Cal.App.3d 803, 810-811 [court lacks discretion to determine reasonable value of attorney fees subject to reimbursement by defendant]; *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 ["[t]he contention that a judgment is not supported by substantial evidence . . . is an obvious exception to the rule" that points not urged below generally cannot be raised on appeal].)

Defendant urges that we modify the judgment to order him to pay $62.50. Normally, we would decline to do so, as it is not our role to make factual findings. (See, e.g., *People v. Flores* (2003) 30 Cal.4th. 1059, 1068-1069 [affirming remand on a

question of what defendant should pay in defense reimbursement costs because defendant's financial circumstances was not an appellate issue].) However, given that there is no factual dispute over the amount that should be paid, we agree with the Third Appellate District, which stated regarding a parole revocation fine that "[i]n the interest of judicial economy, . . . on appeal modification of the judgment . . . , rather than remand to the trial court, is the better practice." (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1256, fn. 2.)

In light of our rulings herein, we have no need, and do not, address defendant's remaining arguments regarding the cumulative effect of the trial court's purported errors.

DISPOSITION

We modify the judgment to reflect that defendant should reimburse probation investigation costs in the amount of $62.50. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment accordingly.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.